IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. BERENICE POARCH, Defendant.	No. CR 02-1248-TUC-CKJ(BPV) **ORDER**

Pending before the Court is Defendant's Motion to Dismiss Count 1 of Third Superseding Indictment for Vindictive Prosecution [Doc. # 394]. Additionally, Defendant has filed a Motion to Suppress Statements Obtained in Violation of *Miranda* [Doc. # 118] and a Motion to Suppress Physical Evidence [Doc. # 122].

1. *Factual and Procedural History*

At 7:38 a.m. on June 27, 2002, law enforcement officers executed a search warrant at the residence of Aaron Habben ("Habben") and Berenice Poarch ("Poarch"). Poarch exited the residence in her night clothes and was escorted by officers to the front porch. Poarch was advised that she could choose whether to stay or leave during the execution of the search warrant, but if she stayed she would not have free rein of the residence. Poarch chose to remain and was subsequently escorted into the living room. At some point, Poarch was permitted to change clothes. When Poarch requested to use the restroom, an officer accompanied Poarch into the restroom. Agent James C. Logan ("Logan") testified that he

spoke with Poarch during the execution of the search warrant. He advised Poarch that she was not under arrest, that she was free to leave, but if she remained, she'd have to stay in a certain area of the residence. Poarch was not advised of her *Miranda* rights. Poarch agreed to cooperate with the investigation. Poarch advised Logan that she suspected Habben was involved with drugs and Habben had opened some bank accounts and conducted transactions from those accounts.

Logan testified that he and Inspector Curran explained consent to search forms to Poarch. Poarch signed a consent to search her vehicle and a consent to search her wallet and purse.

On July 24, 2002, the first grand jury regarding this case indicted several individuals, but did not indict Poarch.

On February 5, 2003, the second grand jury regarding this case returned a superseding indictment. This indictment alleged in one count that Poarch knowingly and willfully conducted financial transactions and did knowingly and unlawfully aid and abet Habben in the laundering of monetary instruments derived from the distribution of anabolic steroids. The evidence before the grand jury included testimony from a witness that was not present during an interview of Poarch. The witness testified that Poarch had said that Habben had her open the accounts. On April 12, 2004, this Court dismissed this count because the count listed five separate acts within the single count.

On April 14, 2004, the third grand jury returned a second superseding indictment. The prosecutor returned to the grand jury because defense counsel argued successfully to the Court that the single charge was duplicitous. This indictment charged Poarch with five separate acts of money laundering and added the charge of conspiracy to money launder. The testimony presented at the grand jury included that Habben and Poarch opened the accounts for the receipt of money and international wire transfers. At a hearing on a motion to compel, the AUSA stated that the postal inspector's report supported the assertion that Habben had Poarch open the account – the report does not include that statement. At the August 23, 2004 hearing, the AUSA indicated that a return to the grand jury was needed to

comply with *Blakely*, 542 U.S. 296, 124 S.Ct. 2531, 1590L.Ed.2d 403 (2004), which had just been decided, and that the information could be corrected. *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), was later decided so there was no need to return to the grand jury.

On February 28, 2006, a fourth grand jury indicted Poarch on the same charges (five counts of money laundering and one count of conspiracy); however, the conspiracy charge of the second superseding indictment alleges the conspiracy period was from on or about 6/26/02 to 6/27/02 while the conspiracy period alleged in the third superseding indictment was from a time unknown to 6/27/02.

2. *Motion to Dismiss – Timeliness*

The government asserts that Poarch's Motion to Dismiss is untimely. However, the government has cited no authority for this assertion. Although Fed.R.Crim.P. 12 recognizes that the Court may set a deadline for pretrial motions, this Court did not impose a deadline in this case. The Court finds the Motion was not untimely.

3. *Motion to Dismiss – Vindictive Prosecution*

"A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right." *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1172 (9th Cir. 2002). Generally a defendant "must make an initial showing that charges were added because the accused exercised a statutory, procedural, or constitutional right." *Id.* "'To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such.'" *United States v. Montoya*, 45 F.3d 1286, 1299 (9th Cir. 1995), *quoting United States v. Sinigaglio*, 942 F.2d 581, 584 (9th Cir. 1991), *overruled on other grounds*.

A presumption of vindictiveness results "when the decision to file increased charges directly followed the assertion of a procedural right." *United States v. Garza-Juarez*, 992

F.2d 896, 907 (9th Cir. 1993). However, during pretrial proceedings, particularly plea negotiations, vindictiveness is not to be "'presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right.'" *Gastellum-Almeida*, 298 F.3d at 1172, *quoting United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000). Here, the government returned to the grand jury due to a duplicitous indictment. The new charge of conspiracy was not more severe but merely clarified the government's case against Poarch. In addition, the charges resulted during pretrial proceedings and the Court finds a presumption of vindictiveness does not exist.

However, Poarch also asserts that the AUSA's conduct before the grand jury supports a finding of the appearance of vindictiveness. Where there is no direct evidence of an expressed hostility or threat to a defendant for having exercised a constitutional right, a defendant must make the initial showing that charges of increased severity were filed in circumstances that give rise to an appearance of vindictiveness. *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1981). Indeed, "[i]t is the appearance of vindictiveness, rather than the vindictiveness in fact, that controls." *United States v. Groves*, 571 F.2d 450, 453 (9th Cir. 1978). In effect, Poarch asserts that the AUSA's conduct in having the allegedly false testimony (Habben had Poarch open the accounts) repeated before the third grand jury only two days after this Court's hearing wherein the testimony was discussed leads to the conclusion that the AUSA knowingly permitted false testimony to be presented to the grand jury. Moreover, Poarch argues, that the reports do not support the testimony that Habben had Poarch open the accounts for the receipt of money and international wire transfers. The "appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights." *United States v. Frega*, 179 F.3d 793, 801 (9th Cir. 1999), *quoting Gallegos-Curiel*, 681 F.2d at 1168-69. The government asserts that the return to the grand jury was at the demand of Poarch and the AUSA was simply clearing up

the indictment. Further, the government argues that the testimony presented by the agents was accurate.

Here, the new charge appear to have been filed in the routine course of prosecutorial review. *See Gallegos-Curiel*, 681 F.2d at 1169. Moreover, the additional conspiracy charge carries a lesser sentencing range than the original charges. The Court finds no appearance of vindictiveness has been shown by the prosecutor's conduct before the grand jury.

4. *Prosecutorial Misconduct*

During the August 1, 2006, hearing, Poarch argued that dismissal was appropriate because of prosecutorial misconduct. However, Poarch had not briefed that argument, thereby precluding the government an opportunity to respond in writing and/or prepare for the argument.

Moreover, to justify dismissal, Poarch must show that she was prejudiced by outrageous governmental misconduct. *See U.S. v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991) (stating "a district court may dismiss an indictment on the ground of outrageous government conduct" under its "supervisory powers" or if the conduct "amounts to a due process violation"); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988) (stating a "district court [has] no authority to dismiss [an] indictment on the basis of prosecutorial misconduct absent a finding that [the defendants] were prejudiced by the misconduct").

To warrant dismissal under the Due Process Clause as a result of prosecutorial misconduct, a defendant must show that the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice to the defendant. *U.S. v. Isgro*, 974 F.2d 1091, 1094 (9th Cir. 1992). Alternatively, under the court's supervisory powers theory, the court may dismiss an indictment for prosecutorial misconduct where the misconduct amounts to a violation of one of those few, clear rules which have been drafted and approved by the court and by Congress to ensure the integrity of the grand jury's functions. *United States v. Williams*, 504 U.S. 36,

46, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992), *internal quotation, citation, footnote omitted*. A defendant challenging an indictment must also establish that the violation "substantially influenced the grand jury's decision to indict," or that there is grave doubt that the decision to indict was free from the substantial influence of such violations. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), *citation, internal quotations omitted*.

Here, the AUSA asserts that any incorrect information presented to the grand jury was inadvertent. Furthermore, the additional conspiracy charge was simply the natural progression of the case as a result of the defense challenge to the previous indictment. Moreover, in issuing the Third Superseding Indictment, the grand jury was not influenced by any alleged misconduct. The Court finds dismissal based on alleged prosecutorial misconduct is not appropriate.

5. *Motion to Suppress Physical Evidence*

The evidence presented at the evidentiary hearing on May 23, 2005, indicates that Poarch, after the initial securing of the residence, was not detained at the residence. Agent Lisa Hartsell ("Hartsell") testified that she advised Poarch she was not under arrest and the procedures that would be followed during the execution of the search warrant. Hartsell informed Poarch that she was free to go or free to remain, but if Poarch remained she would not have free rein of the residence. Agent Logan also testified that he had a similar conversation with Poarch. Poarch chose to remain during the execution of the search warrant. The Court finds that, after the initial securing of the residence (which lasted approximately 5 -10 minutes), Poarch was not detained.

Even if Poarch had been detained, officers may detain a building's occupants while a search warrant is executed as long as the detention is reasonable. *Michigan v. Summers*, 452 U.S. 692, 704-05, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) ("If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of privacy is justified, it is constitutionally reasonable to require that citizen to

remain while officers of the law execute a valid warrant to search his home."). A court is to balance the law enforcement interests against the public's privacy interest in determining whether a detention incident to a search is constitutionally reasonable. *Ganwich v. Knapp*, 319 F.3d 1115, 1120 (9th Cir. 2003). The Ninth Circuit has recognized that "detaining a building's occupants serves at least three law enforcement interests: first, detention prevents a suspect from fleeing before the police discover contraband; second, detention minimizes the risk that an officer or an occupant might be harmed during the search; and third, detention often expedites a search." *Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006), *citing Summers*, 452 U.S. at 702-03, 101 S.Ct. 2587; *Ganwich*, 319 F.3d at 1120. The United States Supreme Court recently confirmed that an officer has the authority "to detain a building's occupants during a search so long as the officer conducts the detention in a reasonable manner." *Dawson*, 435 F.3d at 1066, *citing Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465, 1470, 161 L.Ed.2d 299 (2005). Poarch was not handcuffed, was allowed to remain in her own residence, and was allowed to move about (to the restroom accompanied by an officer). The Court finds the officers' conduct was reasonable and any detention of Poarch during the search was constitutionally permissible.

While Poarch voluntarily remained at the residence, Poarch signed a consent to search her purse and wallet. Whether a consent to search has been voluntarily given is determined "from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). The government bears the burden of proving that the consent was freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *United States v. Shan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997). In *United States v. Jones*, 286 F.3d 1146, 1150 (9th Cir. 2002), the Ninth Circuit identified five factors to be considered in determining the voluntariness of a consent to a search. These factors include the following: (1) whether a defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was notified that she had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained.

Here, Poarch was not in custody, had chosen to remain at the residence, and had indicated that she wished to cooperate with the agents. The agents did not have their guns drawn during the conversation, including the discussion regarding the consent to search, with Poarch. Although Poarch had not been advised of her *Miranda* rights and there was no testimony regarding whether Poarch was advised that a search warrant could be obtained, Poarch was advised that she had a right not to consent to the search. Moreover, Poarch was not threatened in any way to provide her consent. The Court finds that Poarch voluntarily consented to the search of her purse and wallet.

6. *Motion to Suppress Statements Obtained in Violation of Miranda*

A custodial suspect's post-arrest statements given in response to interrogation is only admissible in the government's case-in-chief if the statements are given after a knowing and intelligent waiver of the suspect's *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir. 1998) (citations omitted) ("For inculpatory statements made by a defendant during custodial interrogation to be admissible in evidence, the defendant's 'waiver of *Miranda* rights must be voluntary, knowing, and intelligent.'"). The burden is on the government to show that *Miranda* rights were administered and that the defendant agreed to waive them. *Miranda*, 384 U.S. at 475. Proof of waiver must be by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168-69, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

The obligation to "administer *Miranda* warnings attaches . . . 'only where there has been such a restriction on a person's freedom as to render him "in custody."'" *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (quoting *Oregon v. Mathianson*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). To determine whether a person is "in custody" under *Miranda*, "a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" *Stansbury*, 511 U.S. at 322 (citation omitted). Factors to be considered in

determining whether a reasonable person would believe he was not free to leave include (1) the language used to summon the individual; (2) the extent to which the individual is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual. *United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002), *quoting United States v. Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001), *cert. denied*, 122 S.Ct. 1117 (2002).

Prior to, during, and after the questioning, Poarch remained in her residence. This was after Poarch had been advised by both Hartsell and Logan that she was free to leave. Although Poarch was not allowed free rein of the residence, Poarch was permitted to change clothes and sit in the apparent comfort of the living room. The agents did not confront Poarch with any evidence of her guilt. Moreover, it appears that Poarch was not detained for a long time prior to her discussion with Logan. From the time of the beginning of the execution of the search warrant (7:38 a.m.) until the signing of the consent to search (10:10 a.m.), less than three hours had passed. Further, Poarch was not arrested that day by agents. The testimony of the officers establish that pressure was not used to detain Poarch. The Court finds that Poarch was not in custody. Therefore, the agents were not required to advise Poarch of her *Miranda* rights prior to questioning her.

Accordingly, IT IS ORDERED:

1. Poarch's Motion to Dismiss Count 1 of Third Superseding Indictment for Vindictive Prosecution [Doc. # 394] is DENIED;

2. Poarch's Motion to Suppress Physical Evidence [Doc. # 122] is DENIED, and;.

3. Poarch's Motion to Suppress Statements Obtained in Violation of *Miranda* [Doc. # 118] is DENIED.

DATED this 7th day of August, 2006.

Cindy K. Jorgenson
United States District Judge